Housing and Property Chamber
First-tier Tribunal for Scotland

Decision on homeowner's application:

Property Factors (Scotland) Act 2011 Section 19(1)(a)

Of

the Housing and Property Chamber of the First-tier Tribunal for Scotland

(Hereinafter referred to as "the Tribunal")

Case references : FTS/HPC/PF/18/2937

Re: Property at 124 Millcroft Road, Cumbernauld, G67 2QH ("the Property")

The Parties :

Alex Walker, 124 Millcroft Road, Cumbernauld, G67 2QH ("Applicant")

(represented by Working Legally Ltd, 2/2, 11 Western Avenue, Rutherglen, South Lanarkshire G73 1LQ)

Apex Property Factor Ltd, 46 Eastside, Kirkintilloch, East Dunbartonshire G66 1QH ("Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Sara Hesp - Ordinary (Surveyor) member

DECISION

1. The Tribunal having no jurisdiction to deal with the Applicant's complaints of the Respondents' failure to comply with section 14(5) of the Property Factors (Scotland) Act 2011 or failure to carry out property factor's duties as defined in section 17(5) of that Act, dismisses the application.

Introduction

2. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the rules in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

3. On 31 October 2018, the application was received by the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") from the Applicant's representative seeking decisions that the Respondents had failed to comply with the Property Factor Code of Conduct and other property factor's duties. The application alleged breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, and 6.4 of the Code. It also alleged that the Respondents had breached their duties:
   (1) In not carrying out grass cutting;
   (2) In not cleaning internal common hallways and stairs;
   (3) In not carrying out repairs to stairs, hallways and the roof.

Findings of Fact

4. Having considered all the evidence, the Tribunal found the following facts to be established:-
   (a) The Property is a flat within the development of 112 dwellinghouses numbered 2 to 204B Millcroft Road, Cumbernauld within a row of 12 blocks of flats from the 1980s. The Property includes common parts of the development.

(b) The development is situated on the south-east side of Millcroft Road at the east of the neighbouring development. That neighbouring development consists of a row of blocks of flats numbered 1 to 103 Millcroft Road. Further to the west of that development are the two developments at 1 to 135 Greenrigg Road and 137 to 259 Greenrigg Road respectively.

(c) The Property is owned by Janice Leary. She is the wife of the Applicant.

(d) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 1 November 2012.

(e) The properties within the development are subject to a deed of conditions recorded in the General Register of Sasines on 28 March 1988 ("the Deed of Conditions").

(f) By letter dated 4 July 2018 Working Legal wrote to the Respondents on behalf of certain owners of properties at numbers 7, 13, 27, 29, 83, 85c, 99, 101, 109, 125, 131, 151, 185, 203, 207 and 209d, Greenrigg Road in the development and the neighbouring development complaining of breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, 6.4 and 7 of the Code.

(g) Applications to the Tribunal on behalf of certain other owners in the Greenrigg Road developments and the neighbouring development at Millcroft Road were lodged on 15 August 2018.

(h) By letter dated 1 October 2018 Working Legal wrote to the Respondents on behalf of the owner of the Properties complaining of breaches of sections 1, 2.1, 2.2, 2.4, 2.5, 3.3, 4.9, 6.3, 6.4 and 7 of the Code and breaches of other property factor's duties. There was no response to this letter.

(i) Applications to the Tribunal on behalf of the Applicant in respect of the Property and other properties owned by Ms Leary were lodged on 31 October 2018.

Procedure

5. The application to the Tribunal sought in the first place an order declaring that the Respondents were not as a matter of law factors for the development. They also sought a determination of failure to comply with the Code and also with other property factor's duties. On or about 15 November 2018 a Convener with delegated power of the President of the Tribunal referred the applications to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's casework officer dated 23 November 2018 which also invited the parties to make written representations to the Tribunal and to lodge supporting documents known as productions.

6. The Applicant's representatives lodged productions with the Tribunal on 20 December 2018, and on 10 January 2019. The Respondents lodged productions with the Tribunal on 18 December 2018 and on 3 January 2019 but the latter of these were lodged late and not relied on by the Responents. The Applicant's representatives lodged written representations comprising (1) a skeleton argument; (2) a letter dated 29 November 2018 in response to the Tribunal's direction dated 20 November 2018; and (3) a letter dated 8 December 2018 in response to the Tribunal's direction dated 5 December 2018. The Respondents lodged written representations on 7 November 2018 and on 18 December 2018 (in a letter dated 14 December).

7. A hearing was fixed to take place at the Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT on 4 January 2019 at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by letters from the Tribunal's casework officer dated 22 November 2018. The application was to be heard together with those for case references FTS/HPC/PF/18/2086-2100 and 2939-2941.

8. The hearing took place on 4 January 2019 at 10 a.m. at the venue fixed for it. Mr James Collier of Working Legally appeared for the Applicant. Mr Neil Cowan appeared for the Respondents. The hearing was continued to the same venue and time on 11 February 2019 when it concluded.

Jurisdiction - Summary

9. Two matters arose at the outset. Both had the potential of excluding the jurisdiction (power) of the Tribunal to make the order sought in the applications. In other words if any of them excluded the jurisdiction of the Tribunal it could not consider the breaches of Code and property factor's duties alleged.

10. The first matter was that the Applicant was not the owner of the Property. Rather they were owned by his wife Janice Leary. The second matter was that even if the owner had been the Applicant, there did not appear to be any factoring contract in place between him and the Respondents. In that case it might be difficult to see how the Respondents could owe any duty to the Applicant (or Ms Leary) whether under the Code or as (another) property factor's duty.

Jurisdiction – Non-ownership of Property

11. The Tribunal can only consider applications from owners of land or buildings (heritable property). That is the effect of section 17(1) as read with section 10(5) of the 2011 Act. In this instance the owner of the Property was Janice Leary, the wife of the Applicant. The fact that they are married is immaterial. The fact that Ms Leary authorised the Applicant to provide instruction "as the homeowner" to a representative is immaterial. She cannot make him a homeowner in that way. On any view the Applicant was not an owner of the Property.

12. In these circumstances the Tribunal lacked jurisdiction (power) to deal with the application. For this reason the application had to be rejected. Strictly speaking it was therefore not necessary to deal with the second matter.

Jurisdiction – Issue of Existence of Factoring Contract/Appointment

13. The key remedy sought in the application was an order declaring that the Respondents have not been appointed as property factor. In other words it sought a binding declaration from the Tribunal that the Respondents were not the agents for the homeowners in the development at 2 to 204B Millcroft Road, Cumbernauld.

14. The jurisdiction (power) of the Tribunal is set out in sections 17(1) and 19(1) and (3) and 20 of the 2011 Act. Section 17(1) gives it power to decide, on the application by a homeowner, whether a property factor has failed (a) to carry out property factor's duties; or (b) to ensure compliance with the Code of Conduct. Section 19(1) gives it the power and section 19(3) the duty, to make a property factor enforcement order in the event that it finds any of those failures to have taken place. Section 20 specifies that such an order may require the factor to execute such action as the Tribunal considers necessary or to make payment which the Tribunal considers reasonable.

15. Property factors existed before the 2011 Act. As noted already a property factor is an agent of the owner or owners of property who manages the property on behalf of the owners. That relationship is one of contract in which the owners are the principals or clients of the factor who is their joint agent. Before the 2011 Act if there was no contract of agency with the homeowners there was no property factor. An example of this was in the case *Hanover (Scotland) Housing Association v. Reid*

2006 Scots Law Times 518 where it was found that there had been no valid appointment of the factor.

16. The aim of the 2011 Act was to provide a remedy to homeowners in respect of their property factors and to improve the service provided by such factors. This was reflected in the Policy Memorandum supporting the Bill which became the Act, which stated in paragraph 16:

> "This new form of alternative dispute resolution would enable a homeowner to apply in writing to the homeowner housing panel for a determination of whether *their* property factor had failed to comply with any term of the contract between the parties or with the statutory code of conduct." (Tribunal's emphasis).

That the Act was designed to deal with the relationship between homeowners and "their" accepted factors is emphasized further in paragraph 6 of the Policy Memorandum. In listing the mischiefs which the Act was to deal with, paragraph 6 refers to homeowners and "their" factors and nowhere mentions disputes over appointment of factors such as that in the *Reid* case.

17. The Code underlines the purposes of the Act in its provisions. Almost of all of these deal with the nature of an existing relationship between a factor and his clients. The principal provision of the Code is the requirement that the factor provides the homeowner with a written statement of services. Such services can only be provided (legitimately) as part of a contract between the factor and homeowners. Absent a valid appointment no services would be due and no written statement would be appropriate.

18. If there were no definitions of "homeowner" or "property factor" in the 2011 Act it would be plain that without a contract of agency between homeowner and factor there could be no "property factor's duty" owed

by the factor to the homeowner which could be adjudicated on by the tribunal under section 17(1)(a). Equally given that the Code of Conduct is intended to govern the conduct of a factor towards their client the homewoner, there could be no duty to comply with the Code of Conduct on which the tribunal could adjudicate under section 17(1)(b).

19. Do the definitions in the Act extend the jurisdiction of the tribunal under section 17(1) ? "Homeowner" is defined in section 10(5) of the Act. For that to be satisfied an owner must :

(a) own land (or other immoveable property) the common parts of which are "managed" by a "property factor" or

(b) own residential property neighbouring the land managed by the factor which neighbouring (factored) land is available for the owner's use.

All of that is entirely consistent with the requirement of a contract of agency between factor and owner. Nothing in section 10(5) appears to extend the jurisdiction to situations where there has been no contract between an owner and a person claiming to be the owner's factor.

20. The expression "property factor" was itself defined in section 2(1). That definition while differing in its precise wording from section 10(5) essentially mirrored it. It too was consistent with the requirement for the existence of a contract between the owner and the person who fell within the definition in section 2(1). Again there was no suggestion that the Scottish Parliament intended the jurisdiction of the tribunal to cover situations where there was no contract between the parties to the dispute.

21. Leaving aside any case law it appears plain that the jurisdiction in section 17(1) assumes the existence of a contract of agency between

the applicant homeowner and the respondent factor at the time of the alleged failure. On the basis of that assumption the only question for a tribunal would be whether during the duration of a factor/homeowner contract there has been a breach of factor's duty or breach of the Code of Conduct.

22. It followed that the jurisdiction of the tribunal was not there to make a binding order on the issue of whether the contract of agency (factoring) did or did not exist. The jurisdiction to make such an order remained with the court. The words "property factor" in section 10(5) should be interpreted as meaning "property factor validly appointed on the owner's behalf" and in section 17(1) as "property factor validly appointed on the homeowner's behalf".

23. However there had been suggestions in previous cases that even in the absence of a contract of agency a tribunal had power to make an order against a person who was registered as a factor. The principal case was *FTS/HPC/PF/17/0023*. At Upper Tribunal the case name *McNaught v. Apex Property Factor Limited* was used. The case was unreported. It involved the current Respondents. It involved a nearby development in Millcroft Road.

24. In *McNaught* the applicant complained of breaches by the Respondents of sections 2.2, 2.5, 4.7, 4.8 and 4.9 of the Code. He did not complain of breach of property factor's duties. The breaches alleged were all based on the Respondents not having been appointed factors and despite their lack of appointment having sent invoices to the applicant demanding payment and disregarding his requests for confirmation of their authority to act as factors.

25. The First-tier Tribunal found that the Respondents did not have the authority of the homeowners or their residents' association to act as factors. Nevertheless the tribunal went on to find that there had been breaches of sections 2.2, 2.5, 4.8 and 4.9 of the Code and proposed an order requiring the Respondents to issue a credit note for the illicit invoices.

26. The Respondents sought permission to appeal to the Upper Tribunal on the basis that as the First-tier Tribunal had found that they were not factors the tribunal lacked jurisdiction to propose the order requiring the credit note.

27. The Upper Tribunal refused permission to appeal. In its refusal of permission the Upper Tribunal judge referred to the definition of "homeowner" in section 10(5) of the Act, stating, in paragraph [6] :

> "It is a necessary component of this definition that the homeowner's property be managed by a property factor. The provision contains no express requirement that the property factor who carries out that management should be validly appointed; to imply that condition would not be consistent with the legislative intention of setting minimum standards of practice for all registered property factors (section 14(1)). All that is required is that the property factor who is the subject of the complaint did in fact manage or maintain common property pertinent to the homeowner's property."

The mention of legislative intention appeared to be a reference back to paragraph [4] of the refusal where the Upper Tribunal judge stated that the obligation to comply with the Code applied to a property factor whether validly appointed or not because,

> "When the various breaches of the code identifed [sections 2.2, 2.5, 4.8 and 4.9] are considered it is apparent that no other interpretation would make sense. . . These duties are all aimed at setting minimum standards of practice for registered property factors generally (section 14(1))."

28. However the Upper Tribunal judge had not been given the information in the Policy Memorandum already noted. He was unaware of the assumption of the Scottish Parliament was that there would be a factor in place and that the tribunal (formerly committee) would decide disputes between such factors (validly appointed) and "their" clients, the homeowners.

29. In addition, the Upper Tribunal judge had not taken account of the provisions of the Code as a whole and the key duty in section 1 of the Code, namely to provide a written statement of services with details of the "arrangement in place" between homeowner and factor. It would be most odd if a registered factor who had not been validly appointed by homeowners should require to provide a statement of services. The supply of such a statement would be misleading for homeowners and potentially lead some of them thinking that the factor had been validly appointed when that was not the case. In turn it might lead to factors being forced onto homeowners against their will. None of that can have been the intention of the Scottish Parliament in the 2011 Act.

30. It would also be odd if some parts of the Code were applicable to validly appointed registered factors only and other parts of the Code (e.g. sections 2.2, 2.5, 4.8 and 4.9) to all registered factors whether validly appointed or not. There was no suggestion within the Code that it was to be applied in that manner.

31. In these circumstances it appeared to the Tribunal that the Upper Tribunal had erred in its refusal of permission to appeal in *McNaught*. No doubt this was due to full argument not having been put to the judge. The decision of the Upper Tribunal in *McNaught* was given on an application for permission to appeal and without full submissions. In

these circumstances the Tribunal did not consider it bound by the rationale in *McNaught*.

32. The other case was *FTS/HPC/PF/17/0285/0286-0287* another case involving the Respondents and a nearby development in Greenrigg Road. The property involved was 65 Greenrigg Road. In that case the applicants complained of breaches of sections 1A, 3.3, parts of section 4, 6.2 and 6.3 of the Code and breach of property factor's duties. It was decided on 8 February 2018.

33. In that case the first-tier tribunal found that the Respondents had not been appointed as factors in accordance with the Deed of Conditions which governed appointment. Nevertheless the tribunal went on to find that there had been various breaches of the Code and proposed a property factor enforcement order.

34. The issue of the lack of jurisdiction had not been focussed in that case and the points raised in the current case were not argued. In these circumstances that case did not assist the current Tribunal.

35. Returning to the current case, Mr Collier submitted that despite the lack of appointment the Tribunal still had jurisdiction to make a determination of whether the Code had been complied with. In short he wished the Tribunal to declare that the Respondents were not property factors of the owners in the development but at the same time to determine that the Respondents had failed to comply with the Code and other property factor's duties.

36. The Tribunal found Mr Collier's submission inconsistent. On this branch of the submissions in the present case the Tribunal concluded that if it was established that the Respondents had not been validly appointed

as factors for the Property it had no jurisdiction to consider the breaches of the Code and property factor's duties alleged in the applications under section 17(1)(a) or (b) of the 2011 Act.

Factoring Contract/Appointment of Respondents for Property

37. The Tribunal considered whether the Respondents had been validly appointed as factors for the Property. It was accepted that there had been no factor in place at the beginning of 2015. It was also accepted tha there had been no residents' association in operation for the development.

38. The development consisted of more than one tenement. In that situation the default rules for the appointment of a factor were as set out in section 28 of the Title Conditions (Scotland) Act 2003 (2003 Act, s.31A). Section 28(1) provided that subject to certain other sections (which did not apply in the present case) and, importantly, any provision made in community burdens, the owners of a majority of the units in a community could:

(a) appoint a person to be the "manager" of the community on such terms as they may specify;

(b) confer on such manager the right to exercise such of the owners' powers as they may specify (including maintenance powers);

(c) revoke or alter the manager's rights to exercise those powers; or

(d) dismiss the manager.

39. In the present case, however, there were provisions in community burdens which overrode the default rules. These were in the Deed of Conditions recorded in the General Register of Sasines on 28 March 1988. The development and community covered by the 1988 Deed of Conditions was the 112 dwellinghouses numbered 2 to 204B Millcroft Road within 12 tenements. The Deed of Conditions provided :

"6. . . . (1) there will be appointed a Factor who will be responsible for supervising the common repairs to and maintenance of the Property, the Blocks, the Curtilage and the Common Parts and apportioning the cost thereof amongst the proprietors in accordance with this Clause."

"9.(1) On completion and sale of the last flatted Dwellinghouse the appointed Factor shall arrange the setting up of a Residents Association whereby the proprietor of each Dwellinghouse shall become a member of such an Association and the proprietor shall have only one vote in deciding matters of common interest to the entire block of flatted Dwellinghouses; such a Residents Association shall have no power in deciding the maintnenance and upkeep of the property without a majority consent from the proprietors of the one hundred and twelve dwellinghouses or a majority consent from the proprietors of the flatted dwellinghouses in each respective block.".

The Deed of Conditions also made provision for a quorum for the meeting of the Residents' Association. The provisions of the Deed of Conditions for the quorum differed from those of the Deeds of Conditions for the neighbouring developments both in Millcroft Road and Greenrigg Road.

40. The Tribunal did not receive any evidence regarding the appointment or non-appointment of a factor at the development at 2 to 204B Millcroft Road. Mr Collier did not make any submission on the operation of the factoring provisions in the March 1988 Deed of Conditions. They differed from those in the other applications considered at the hearing.

41. In the circumstances, given that lack of evidence and submission and that the application fell to be dismissed in any event because of the Applicant's lack of ownership of the Property the Tribunal did not consider the application further.

42. The Tribunal observed that their dismissal of the application was no bar to Ms Leary putting forward her application in the future supported by relevant submissions and evidence.

Expenses

43. At the end of the hearing Mr Collier requested the Tribunal to make an award of expenses in respect of the cost of him requiring to attend at the second day of the hearing. He submitted that this had been caused by the unreasonable behaviour of the Respondents at the first day when they requested time to make an oral response in connection with the alleged breaches of sections 3.3, 4.9, 6.3, 6.4 and 7.1 of the Code. He estimated the wasted cost at the rate of £ 7.83 per hour to cover the hearing on the second day (2 ¼ hours) plus the duration of travel from the Tribunals Centre to Rutherglen which was 50 minutes.

44. The Tribunal did not find that the request by the Respondents to make an oral response to the alleged breaches of the sections of Code was unreasonable behaviour. Whilst at the end of the first day Mr Collier had indicated that he did not wish to add to his written submissions on those sections of the Code that did not mean that it was unreasonable behaviour for the Respondents to wish to add or even consider adding oral representations to their written submissions on those sections at a continued hearing. The Tribunal refused the request for an order for payment of expenses.

Opportunity for Review, Representations and Rights of Appeal

45. The Applicant or Respondents may seek a review of and make representations to the First-tier Tribunal on this decision. Any request for a review or the making of such representations must be made in writing to the Tribunal by no later than 14 days after the day when this decision was sent to the parties. It must state why a review is necessary.

46. The opportunity to make representations and to seek a review is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their request for a review and written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

47. **In the meantime and in any event, the Applicant or the Respondents may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission.**

48. **All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016. The seeking of a review and the making of representations does not suspend or otherwise affect this time limit.**

D Bartos

Signed . .Legal Member and Chairperson

.....8 April 2019.....Date